(5)

No. 97-501

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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37 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the reasonableness clause of the Fourth Amendment incorporate the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace?

2. May a municipality, consistent with the reasonableness clause of the Fourth Amendment, require its police officers to make full custodial arrests for an alleged violation of a fine only license ordinance "in order to ensure compliance with the ordinance?"

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals (Pet.App. 1-9) is reported at 116 F.3d 388. The opinion of the district court (Pet.App. 11-19) is reported at 904 F.Supp. 828.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court was invoked under 28 U.S.C. §1254 in a petition filed on September 17, 1997. The Court granted the petition on January 9, 1998.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner Randall Ricci is the principal of a telemarketing firm. In April of 1994, the Arlington Heights, Illinois police department received complaints about the business practices of petitioner's firm. (App. 18.) The complaints were about "high pressure to contribute . . . on behalf of the Arlington Heights Police Department." (App. 20.) The police department had not been soliciting contributions (App. 19) and the matter was assigned to police officer Whowell, who was instructed to determine if petitioner's firm had been issued a business license by the municipality.[1] (App. 19-20.)

After Whowell discovered that petitioner's firm had not been issued a license (App. 70) he was instructed by his supervisor Commander Fellman "to check with the principals of the organization should he ever have occasion to go over there." (App. 23.) Fellman instructed Whowell to arrest petitioner if he could not produce a valid municipal business license. *Id.*

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1. Section 14-3001 of the Arlington Heights Village Code provides that "businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code." Section 14-3002 contains an extensive list of businesses and includes a catch-all provision covering "[a]ny and all business enterprises not named elsewhere in this Code."

On April 19, 1995, several weeks after the first complaint (App. 18) and two or three days after he had been assigned to the case (App. 49), Whowell and officer Lehnert went to petitioner's office to execute an arrest warrant on one of petitioner's employees.[2] After executing the warrant, the officers reaffirmed that petitioner did not have a municipal business license. (App. 65.)

Respondent's long standing policy[3] is to require full custodial arrests of persons suspected of violations of the business license ordinance. (App. 34.) As explained by Commander Fellman, "If we have a violation of ordinance, the suspect is arrested, brought to the station, charged, bonded, and given a court date." (App. 23) Commander Fellman explained that the municipal policy was required because "[w]e have no instrument designed for citing them in the field." (App. 31.)

As required by the municipal policy, Whowell and Lehnert placed petitioner under arrest (App. 42) and transported him to the police station where they locked him into an interrogation room. (Pet.App. 12.) Petitioner, who was not free to leave, (App. 42), remained in the locked interrogation room (App. 68) while the officers prepared an ordinance violation complaint. (App. 66.) Petitioner was released on a personal recognizance bond after about an hour of detention. (Pet.App. 15.)

Petitioner's spouse obtained the business license while petitioner was in police custody, (Pet.App. 12), and the

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2. This arrest warrant was unrelated to petitioner's business.

3. The policy has been in effect since at least 1973, when Commander Fellmann joined the Arlington Heights Police Department. (App. 17, 30-31.)

ordinance charge was dismissed at plaintiff's first court appearance. (Id.) This disposition has been anticipated by the arresting officers, who knew that the ordinance violation charge would be dismissed when petitioner appeared in court with a business license. (App. 73-74.)

Following the conclusion of state court proceedings, petitioner brought an action under 42 U.S.C. §1983 in the district court against the arresting officers and respondent, the Village of Arlington Heights. bond One of petitioner's claims was that respondent's policy of requiring full custodial arrests for violation of its fine-only business license ordinance resulted in his unreasonable seizure. Amendment.[4] (Complaint, par. 15, App. 5.) Petitioner urged that a full custodial arrest for a fine-only ordinance violation not involving a breach of the peace is contrary to the Fourth Amendment. *Id.*

Respondent moved for summary judgment, admitting that its municipal policy was to require full custodial arrests for alleged violations of its business license ordinance. (Pet.App. 12.) The district court found that the arresting officers had visited petitioner's business "to gather evidence to put him out of business," (Pet.App. 14), but concluded that

4. In addition to the municipal liability claim before this Court, petitioner asserted two claims against the individual officers: first, that he had been arrested without probable cause and second, that, before arresting him, the officers had conducted an unreasonable search of petitioner's business. The district court found against petitioner on the probable cause to arrest issue and held that a trial was required to resolve the search issue. (Pet.App. 15-16.) Neither claim is at issue in this proceeding: the parties settled the unreasonable search claim and petitioner did not challenge the probable cause ruling on appeal.

"the Village policy requiring custodial arrests for violations of its business-license ordinance does not offend the Fourth Amendment." (Pet.App. 19.)

The court of appeals affirmed, holding that a municipality may require full custodial arrests for violation of a fine only business license ordinance to "prevent[] Ricci from continuing to violate a law" (Pet.App. 7) and "in order to ensure compliance with the ordinance and in order to complete the necessary paperwork." (Id.) In the view of the Seventh Circuit, petitioner could not complain about the reasonableness of his warrantless arrest because "a neutral magistrate following Illinois law would surely have issued a warrant in this case."[5] (Pet.App. 8 n.1.)

SUMMARY OF ARGUMENT

The Court's teachings suggest two alternative starting points for assessing the constitutional reasonableness of respondent's municipal policy of requiring full custodial arrests to initiate enforcement proceedings of its fine-only business license ordinance: The first is to consider the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The second, applied in *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), is to assess the costs and benefits of the policy. Each approach in this case yields the same result: respondent's policy resulted in an unreasonable seizure.

When the Fourth Amendment was adopted, a peace officer could lawfully make an arrest for a non-felony only

5. The court of appeals also stated that it would not consider petitioner's argument "that no neutral magistrate would have issued a warrant in this case" because petitioner had not raised this argument in his brief. (Pet.App. 8.)

when the offense had been committed in his presence and involved a breach of the peace. *Carroll v. United States*, 267 U.S. 132, 156 (1925). The overwhelming majority of states continue to circumscribe an officer's power to make a warrantless arrest in non-felony cases. These contemporary translations of the common law rule provide strong evidence that respondent's policy of using warrantless custodial arrests to initiate prosecutions for violations of its fine-only business ordinance is constitutionally unreasonable.

Respondent has sought to justify its mandatory arrest policy because its officers do not carry ordinance citation forms. This is a wholly inadequate basis on which to require custodial arrests — it would not be difficult for respondent to create a ticket book to issue field citations.

The Seventh Circuit upheld respondent's mandatory arrest policy as necessary "in order to ensure compliance with the ordinance." (Pet.App. 7.) Other jurisdictions rejected this rationale long ago, because "it is to all intents and purposes a separate and independent punishment for the offenses specified," *Judson v. Reardon*, 16 Minn. 431, 434 (1871) and because vesting officers with such power is "liable to great abuses." *Pow v. Beckner*, 3 Ind. 474, 478 (1852).

The appropriate translation of the common law limitations on warrantless arrests in non-felony cases to fine-only infractions is that a custodial arrest is constitutionally unreasonable unless there is an actual or threatened breach of the peace: the Fourth Amendment should not be warped to permit arrests "to ensure compliance."

ARGUMENT

-I-

At common law, an officer "was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence." *John Bad Elk v. United States*, 177 U.S. 529 (1900). The officer must be "apprised by any

of his senses that a crime is being committed." Wilgus, *Arrest Without Warrant*, 22 Mich.L.Rev. 673, 680 (1924). The common law rule further restricted the officer's power to make an arrest without warrant to "those cases where the public security requires it; and this has only been recognized in felony and in breaches of the peace committed in presence of the officer." *In the Matter of Sara May*, 41 Mich. 299, 304, 1 N.W. 1021, 1024 (1879).

Although the Court has acknowledged the common law rule on several occasions,[6] it has yet to consider whether, and under what circumstances, an arrest without warrant for a minor offense contravenes the Fourth Amendment.

The Court considered whether an arrest without warrant for a felony contravenes the Fourth Amendment in *United States v. Watson*, 423 U.S. 411 (1976). In upholding such warrantless arrests and continuing the common law rule, the Court observed that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact." Id. at 421.

A felony is quite different from the fine only infraction in this case. Here, petitioner was arrested because he had not applied for a business license.[7] Petitioner did not refuse to

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6. *See, e.g., Kurtz v. Moffitt*, 115 U.S. 487, 498-99 (1885); *Carroll v. United States*, 267 U.S. 132, 156-57 (1925); *Davis v. United States*, 328 U.S. 582, 588 n.4 (1946); *United States v. Watson*, 423 U.S. 411 (1976).

7. Petitioner argued in the district court that his business was not subject to the municipal licensing ordinance and that the ordinance did not authorize the arrest of a corporate officer (Pet.App. 15-16.) The district court resolved these issues against petitioner. *Id.* Neither question is at issue in this Court.

accept a summons,[8] but was arrested because of a municipal policy requiring a full custodial arrest to initiate a judicial proceeding to enforce the ordinance. Moreover, although the potential punishment for petitioner's offense was a fine, the arresting officers knew that no sanction would be imposed if petitioner purchased a license. (App. 73-74.) Petitioner's spouse obtained the license while petitioner was in police custody (Pet.App. 12) and, as the arresting officers had expected, the ordinance charge was dismissed at petitioner's initial court appearance. *Id.*

In his concurring opinion in *Gustafson v. Florida*, 414 U.S. 260 (1973), Mr. Justice Stewart observed that "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." 414 U.S. at 266-67 (concurring opinion). The motorist in *Gustafson*, however, had conceded the reasonableness of his custodial arrest for failure to have his vehicle operator's license in his possession, 414 U.S. at 262, and the Court did not consider the merits of what Mr. Justice Stewart had described as a "persuasive claim."

This case provides the Court with an opportunity to consider whether there are any "constitutional limits upon the use of 'custodial arrests' as the means for invoking the criminal process when relatively minor offenses are involved," *Robbins v. California*, 453 U.S. 420 (1981), (Stevens, J., dissenting opinion), If the Fourth Amendment imposes any limits on the use of custodial arrests to initiate enforcement proceedings of a fine-only ordinance, the municipal policy

8. *Compare Kirchoff v. Flynn*, 786 F.2d 320 (1986) (full custodial arrest for walking dogs off-leash and feeding pigeons because citizen refused to accept citation).

that required petitioner's arrest cannot stand.

-II-

The Court's teachings suggest two alternative starting points for assessing the constitutional reasonableness of respondent's municipal policy: the first is to consider the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."[9] *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The second is to assess the costs and benefits of the policy.[10]

9. See, e.g., *Hester v. United States*, 265 U.S. 57, 58 (1924) (distinction between open fields and dwelling "is old as the common law"); *Henry v. United States*, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history."); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (considering common law rules of immunity for arresting officers); *United States v. United States District Court*, 407 U.S. 297, 316 (1972) (evaluating Fourth Amendment in light of *Leach v. Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765)); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) ("Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."); *Payton v. New York*, 445 U.S. 573, 591 (1980) (considering "common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony"); *California v. Hodari D.*, 499 U.S. 621 (1991) (common law principles of arrest); *Steagald v. United States*, 451 U.S. 204, 217 (1981) ("The common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."); *Whren v. United States*, 517 U.S. 806 (1996) (adhering to "the traditional common-law rule that probable cause justifies a search and seizure").

10. See, e.g., *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 618 (1989) ("Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,'" quoting *Delaware v. Prouse*, 440 U.S.

Each approach in this case yields the same result: respondent's policy resulted in an unreasonable seizure.

-A-

When the Fourth Amendment was adopted, a peace officer could lawfully make an arrest for a non-felony only when the offense had been committed in his presence and involved a breach of the peace. *Halsbury's Laws of England,* vol. 9, part. III, 117 (2d ed. 1933), cited (1st ed. 1909) in *Carroll v. United States,* 267 U.S. 132, 156 (1925). "Authority to arrest even for a misdemeanor amounting to a breach of peace committed in the officer's presence appears to be limited to the duration of the emergency: to keep it from starting, to stop it after it starts, to keep it from starting again." Coates, *The Law of Arrest in North Carolina,* 15 N.C.L.Rev 101, 110 (1936).

The common law rule is illustrated in *Coupey v. Henley,* 2 Esp. 540, 170 Eng.Rep. 448 (C.P.1797). There, one of the participants in a scuffle had complained to the constables

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648, 654 (1979).); *Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987) (evaluating "special needs" of probation system); *New York v. Berger* 482 U.S. 691, 702 (1987); (criteria for warrantless inspection of regulated business); *Bell v. Wolfish,* 441 U.S. 520, 558 (1979) (reasonableness under the Fourth Amendment "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails"); *New Jersey v. T.L.O.,* 469 U.S. 325, 337 (1985) ("what is reasonable depends on the context within which a search takes place"); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual.")

who "without any warrant or other authority" arrested the plaintiff. The officers had not witnessed the incident. In directing a verdict for the plaintiff in a false arrest case, the Court stated as black letter law that "a constable is not warranted to take a person into custody for a mere assault, unless he is present at the time, and interposes with a view to prevent a breach of the peace."[11]

At common law, arrest without warrant was unheard of for fine-only ordinance violations, which were enforced by an action of debt or assumpsit. 9A McQuillan, *Municipal Corporations* (3d ed 1996), §27.05. "[R]ecoveries for violation of an ordinance were to be by 'action of debt,' and the first process was a 'summons or warrant for the arrest of the offender,' as the 'trustees' might by ordinance determine." *City of Greeley v. Hamman,* 12 Colo. 94, 98 (1888).

The common law limitations on warrantless arrests in non-felony cases were uniformly followed and reaffirmed through the mid-nineteenth century. *See, e.g., Pow v. Beckner,* 3 Ind. 475 (1852); *In re Kellam,* 55 Kan. 700, 41 P. 960 (1895); *Pesterfield v. Vickers,* 43 Tenn. 205 (1866); *State v. Lutz,* 85 W.Va. 330, 101 S.E. 434 (1919).

One of the first attempts to change the common law rule that secured judicial approval involved a Missouri statute applicable to Kansas City that allowed warrantless arrests in misdemeanor cases on the same basis as in felony cases. *State v. Grant,* 76 Mo. 236, 243 (1882). The Missouri Supreme Court upheld a subsequent enactment that extended this rule to St. Louis, relying on a need to arm police officers

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11. The Court in *Coupey* recognized an exception to this rule when there is "reasonable ground to the constable to believe a felony would probably ensue."

with greater powers because of "civil conditions in cities." *Hanser v. Bieber,* 271 Mo. 326, 197 S.W. 68, 70 (1917).

A similar terse analysis appears in the decision of the Illinois Supreme Court that upheld warrantless arrests for misdemeanors and ordinance violations on the same basis as felonies. In *People v. Edge,* 406 Ill. 490, 94 N.E.2d 359 (1950), the defendant has been arrested for "operating a motor vehicle without a safety-inspection sticker and obstructing an alley," in violation of two municipal ordinances. 406 Ill. at 498, 94 N.E.2d at 363. In rejecting the defendant's arguments that his arrest was unlawful, the Illinois Supreme Court held that because an ordinance violation punishable by fine is a "criminal offense," a person committing an ordinance violation such as operating a motor vehicle without a safety-inspection sticker is subject to arrest without warrant. 406 Ill. at 497, 94 N.E.2d at 363.

The equally cursory analysis appears in the decision of the Fourth Circuit in *Fisher v. Washington Metro. Area Transit Authority,* 690 F.2d 1133 (4th Cir. 1982). There, in upholding a full custodial arrest for eating on the subway, 690 F.2d at 1135, the Fourth Circuit held that a warrantless arrest for violation of a fine only ordinance is reasonable if based on probable cause because this Court has never held to the contrary. 690 F.2d at 1139 n.6. To the same effect is *Higbee v. City of San Diego,* 911 F.2d 377 (9th Cir. 1990), where the Ninth Circuit read *United States v. Watson,* 423 U.S. 411 (1976) as setting out the rule for arrest without warrant in misdemeanor and felony cases.[12] Id. at 379.

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12. *But see United States v. Philibert,* 947 F.2d 1467, 1469 (11th Cir. 1991), citing *Watson* for the proposition that "since these were petty offenses, not committed in the presence of the arresting officer, they were probably the subject of citation proceedings, and could not have formed a valid basis for issuance of an arrest warrant."

In this case, the Seventh Circuit upheld respondent's custodial arrest policy because it concluded that the "common law rule has been relaxed to include arrests for offenses other than breaches of the peace." (Pet.App. 6.) Although two of the three states that comprise the Seventh Circuit have sought to authorize full custodial arrests for fine-only ordinance violations,[13] most states continue to place strict limitations on an officer's power to make warrantless arrests for non-felonies.

-B-

Although the distinction between misdemeanors and felonies has become less distinct,[14] the overwhelming majority of states continue to circumscribe an officer's power to make a warrantless arrest in non-felony cases.[15] These

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13. Illinois authorized full custodial arrests for ordinance violations in *People v. Edge, supra.* In Wisconsin, full custodial arrests for fine only violations are permitted only for offenses which are committed in the presence of the officer. *City of Milwaukee v. Nelson,* 149 Wis.2d 434, 457 439 N.W.2d 562, 571 (1989) Indiana adheres to a modified "in the presence of" limitation, Ind.Code.Ann. §35-33-1-1 and has long limited the power to make arrests in ordinance violation cases to situations necessary "to suppress riots and disorders in actual progress." *Pow v. Beckner,* 3 Ind. 474, 478 (1852).

14. See *Garner v. Tennessee,* 471 U.S. 1, 14 (1985) ("while in earlier times 'the gulf between the felonies and the minor offenses was broad and deep,' [citations omitted], today the distinction is minor and often arbitrary.")

15. One exhaustive study found only eight states that have sought to authorize warrantless arrests for misdemeanors on the same basis as for felonies. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment,* 58 Mo. L. Rev. 771, 783 n.18 (1993).

contemporary translations of the common law rule provide strong evidence that respondent's policy of using warrantless custodial arrests to initiate prosecutions for violations of its fine-only business ordinance is constitutionally unreasonable.

The most common limitation on an officer's power to make warrantless arrests for non-felonies is the requirement that the offense has been committed "in the presence" of the officer.[16] Of the original thirteen colonies, only New York has sought to authorize warrantless arrests for any offense, whether or not committed in the officer's presence, without regard to any indicia of "breach of the peace"[17]

Connecticut permits warrantless arrests for misdemeanors only when "the person arrested is taken or

16. Both the district court (Pet.App. 18) and the court of appeals (Pet.App. 6) concluded that petitioner had violated the license ordinance "in the presence" of the officers. Although this conclusion may be literally correct, the common law understanding of "in the presence of" required that the wrongdoing be readily apparent to the officers. *Pickett v. State,* 99 Ga. 12, 25 S.E. 608, 609 (1896); The officers must see something that is is "sufficiently indicative of a crime being in the course of commission," *People v. Moore,* 11 N.Y.2d 271, 272, 228 N.Y.S.2d 822, 823, 183 N.E.2d 225, 226 (1962); *United States v. Viale,* 312 F.2d 595, 600 (2d Cir. 1963). Respondent's ordinance (App. 15-16) does not require display of a business license; in this case, that petitioner did not have a business license did not become readily apparent until petitioner searched for, and could not locate, the license. (App. 65.)

17. N.Y. Crim. Pro. Law §140.10 (McKinney 1997) permits an officer to make warrantless arrest for any offense "whether in his presence or otherwise." The statute permits full custodial arrests for minor traffic infractions. *People v. Terrero,* 139 A.D.2d 830, 831, 537 N.Y.S.2d 135, 136 (1988)

apprehended in the act or on the speedy information of others."[18] The "speedy information" provision prohibits a warrantless arrest 11 hours after the alleged offense. *State v. Carroll,* 131 Conn, 224, 38 A.2d 798 (1944).

Delaware authorizes warrantless arrests for misdemeanors committed in the presence of the officer or in situations which are a modern equivalent of "breach of the peace." Under 11 Del.Code Ann. §1904 (1997), an arrest for a misdemeanor may be made without warrant for offenses committed out of the officer's presence involving "physical injury or the threat thereof. . . illegal sexual contact or attempted sexual contact. . . violation of a protective order issued by Family Court; or . . . misdemeanor occurring on school property."

Georgia likewise has narrowly defined the situations in which an officer may make a warrantless arrest for a misdemeanor not committed in his (or her) presence. Ga.Code.Annot. §17-4-20 (1997) permits warrantless arrests in cases involving "family violence," physical abuse of a vulnerable adult, "or for other cause if there is likely to be failure of justice for want of a judicial officer to issue a warrant."

In Maryland, warrantless arrests are only permitted for offenses committed in the officer's presence or view. Md.Ann.Code of 1957, Art. 27, §594B. Custodial arrests can be made for ordinance violations only when "the defendant has previously failed to respond to a summons for an offense other than a non-moving traffic offense; or there is a substantial likelihood that the defendant will not respond to a summons." *Schaefer v. State,* 31 Md.App. 437, 440, 356 A.2d

18. Conn. General Statute §54-1f(a)

617, 620 (1976).

With carefully enumerated exceptions for specific motor vehicle violations, Mass.Ann.Laws. ch. 90, §21, Massachusetts follows the common law rule, permitting a warrantless arrest for a non-felony only when an offense is committed in the presence of the officer and involves a breach of the peace. *Commonwealth v. Baez,* 42 Mass.App. 565, 678 N.E.2d 1335, 1338 (1997) Under this standard, an officer may not make an arrest for driving with a defective headlight. *Id.* Nor may an officer make a warrantless arrest for unlawful possession of an undersized lobster. *Commonwealth v. Wright,* 158 Mass. 149, 33 N. E. 82 (1893).

New Hampshire also enforces the "in the presence of" rule, but has created two exceptions: one for cases involving domestic violence and stalking, the other when the officer "has probable cause to believe that the person to be arrested has committed a misdemeanor or violation, and, if not immediately arrested, such person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property. N.H. Rev. Stat. Ann. §594:10 (1996)

New Jersey permits warrantless arrests for misdemeanors when three conditions are met: "(1) that the offenses must have occurred 'upon view' of the arresting officer and (2) that the offender was a disorderly person or (3) was committing a breach of the peace." *State v. Vonderfecht,* 284 N.J.Super. 555, 557, 665 A.2d 1145, 1146 (1995). As construed by the New Jersey Supreme Court, the statute does not permit a warrantless arrest for littering. *State v. Hurtado,* 113 N.J. 1, 549 A.2d 428 (1988), *reversing on dissent in* 291 N.J.Super. 12, 23, 529 A.2d 1000, 1006 (1987).

North Carolina also retains the "in the presence of" requirement, with two statutory exceptions: when the offender "[w]ill not be apprehended unless immediately

arrested, or may cause physical injury to himself or others, or damage to property unless immediately arrested." N.C. Gen. Stat. §15A-401 (1997).

Pennsylvania "has restricted the authority of police officers to make warrantless arrests for crimes not committed in their presence to a relatively narrow band of offenses. . . police officers [in Pennsylvania] seem to possess an extremely broad authority to arrest for some offenses that are committed in their presence, even when these offenses are of only the the most trivial sort, often not even crimes. McCarthy, *Warrantless Arrests in Pennslyvania,* 92 Dick.L.Rev. 115, 130 (1987).

Rhode Island has abandoned the "in the presence of" requirement, *State v. Berker,* 120 R.I. 849, 855, 391 A.2d 107, 111 (1978) but permits warrantless misdemeanor arrests only when the officer "has reasonable ground to believe that person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested." R.I.Gen. Laws §12-7-3 (1996).

South Carolina authorizes warrantless arrests for offenses committed "in view," provided that the arrest is "made at the time of such violation of law or immediately thereafter." S.C. Code Ann. §17-13-30 (1997).

Virginia adheres to the "in the presence" of requirement for warrantless misdemeanor arrests. Va. Code Ann. 19.2-81 (1997. This requirement also appears in 41 federal statutes.[19]

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19. The statutes include 8 U.S.C. §1357, 16 U.S.C §3375, 16 U.S.C. §1172, 16 U.S.C. §1338, 16 U.S.C. §1377, 16 U.S.C. §1540, 16 U.S.C. §1861, 16 U.S.C. §1a-6, 16 U.S.C. §5506, 16 U.S.C. §559c , 16 U.S.C. §668(b), 16 U.S.C. §670j , 16 U.S.C. §690e, 16 U.S.C. §706, 16 U.S.C. §727, 16 U.S.C. §742j-1, 16 U.S.C. §831c-3, 16 U.S.C. §916(g), 16 U.S.C. §959, 16 U.S.C. §971f, 16 U.S.C. §972g , 18 U.S.C. §3052 18 U.S.C. §3056 , 18 U.S.C. §3061, 18 U.S.C. §3063 , 19 U.S.C. §1589a, 21

Many of the states without the common law history of the original colonies have adopted different variations on the the common law limitations on an officer's right to make arrests without warrant in non-felony cases. Hawaii does not permit warrantless arrests for a motor vehicle violation that is not a misdemeanor. *State v. Vallesteros*, 933 P.2d 632 (1997). Alaska permits an officer to make a warrantless arrest for a non-felony only when "personal or property damage is likely to be done unless the person is immediately arrested," and "there is no known judicial officer empowered to issue a warrant within a radius of 25 miles of the person to be apprehended." Alaska Stat. §12.25.035.

New Mexico adheres to an "in the presence of" requirement for warrantless misdemeanor arrests, *State v. Tywayne H.*, 123 N.M. 42, 933 P.2d 251, 257 (1997) and requires that "once an officer has the right to arrest without a warrant for a misdemeanor or breach of the peace committed in his presence he must do so as soon as he reasonably can, and if he delays for purposes disassociated with the arrest or for such a length of time as to necessarily indicate the interposition of other purposes, he cannot arrest without a warrant." *State v. Calanche*, 91 N.M. 390, 393, 574 P.2d 1018, 1021 (1958).

Arizona authorizes warrantless arrests for misdemeanors on probable cause, but also requires the arresting officer to issue a complaint and notice in misdemeanor and petty offense cases. 5A Ariz. Rev. Stat. § 13-3884, §13-3903;

U.S.C. §372, 21 U.S.C. §878, 22 U.S.C. §1978, 22 U.S.C. §2709, 25 U.S.C. §2803, 26 U.S.C. §7608, 28 U.S.C. §566, 33 U.S.C. §452, 33 U.S.C. §466, 40 U.S.C. §212a , 40 U.S.C. §212a-2, 42 U.S.C. §2456a, 42 U.S.C. §7270a, 43 U.S.C. §1733, and 49 U.S.C. §44903.

State v. Taylor, 167 Ariz. 439, 808 P.2d 324 (1991)

Oklahoma adheres to a strict "in the presence of" requirement for misdemeanor cases, with statutory exceptions for domestic abuse and driving while intoxicated. 22 Okl.St. §196; *Tomlin v. State*, 869 P.2d 334, 338 (1994).

Utah also adheres to the "in the presence of" requirement, *Salt Lake City v. Hanson*, 19 Utah 2d 32, 34, 425 P.2d 773, 774 (1967), with exceptions for carefully delineated emergency situations.[20]

Wyoming law is similar to that applied in Utah, requiring that the offense has been committed "in the presence of" the arresting officer or that there be a predefined emergency situation, using the same list as in Utah. Wyo.Stat. §7-2-102 (Supp. 1994); Wyo.Stat. §31-5-1204(a); *Nellis v. Wyoming Department of Transportation*, 932 P.2d 741, 744 (Wyoming 1997).

Idaho law also enforces the "in the presence of" requirement for warrantless misdemeanor arrests. *State v. Bowman*, 124 Idaho 936, 940, 866 P.2d 193, 197 (1994); Idaho Code § 19-603.

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20. Utah Code Ann. §7707-2(3) provides for arrest without warrant when the officer:

> (3) . . . has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
>
> (a) flee or conceal himself to avoid arrest;
>
> (b) destroy or conceal evidence of the commission of the offense; or
>
> (c) injure another person or damage property belonging to another person.

In South Dakota, "an arrest for a misdemeanor must be made upon a warrant, unless committed in the presence of the arresting officer." *State v. Spry,* 87 S.D. 318, 327, 207 N.W.2d 504, 509 (1973). The same rule applies in North Dakota. *State v. Ritter,* 472 N.W.2d 444, 447 (North Dakota 1996); N.D.C.C. §29-06-15

Montanta permits a warrantless arrest when an offense is being committed or when the officer has probable cause to believe that "the person has committed an offense and existing circumstances require immediate arrest." Mont. Code Anno. §46-6-311 (1997). In *State v. Jetty* 176 Mont. 519, 579 P.2d 1228 (1978), the Montana Supreme Court held that a person detained on a warrant for failure to pay an overdue $1.00 parking ticket could not be subjected to a full custodial search.

Colorado permits warrantless arrests, without the "in the presence of" requirement, for misdemeanors, *Garcia v. People,* 160 Colo. 220, 416 P.2d 373 (1966), but not for minor traffic infractions. *People v. Barrientos,* 1997 WL 703351 (Colo.App. 1997).

In Nebraska, "without an exigent circumstance, a police officer may not arrest an individual for a misdemeanor unless it is committed in the officer's presence." *State v. Marcotte,* 233 Neb. 533, 537, 446 N.W.2d 228, 232 (1989). The statute defines exigent circumstances as follows: "(a) will not be apprehended unless immediately arrested; (b) may cause injury to himself or others or damage to property unless immediately arrested; (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the the officer." Neb.Rev.Stat. §29-404.02 (1997).

Nevada permits a warrantless arrest for any "public offense" committed in the officer's presence, and has relaxed

the "in the presence of" requirement for "a felony or gross misdemeanor."[21] Nev.Rev.Stat. §171.124 (1997).

West Virginia adheres to the "in the presence of" standard. *Simon v. West Virginia Department of Motor Vehicles,* 181 W.Va. 267, 268, 383 S.E.2d 320, 321 (1989); W.Va. Code §62-10-9 (1997).

Kansas expanded the "in the presence of" requirement in 1970, when it authorized warrantless misdemeanor arrests "in certain emergency situations." *State v. Flummerfelt,* 235 Kan. 609, 612, 684 P.2d 363, 366 (1984); Kan.Stat.Ann. 22-2401 (1997).

At least 42 states continue to recognize some aspect of the common law limitation on warrantless arrests in non-felony cases. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment,* 58 Mo. L. Rev. 771, 783 n.18 (1993). The continued vitality of the common law limitations on warrantless arrests in non-felony cases supports the rule advanced by petitioner — that a warrantless arrest for violation of a fine-only ordinance not involving any breach of the peace is unreasonable under the Fourth Amendment.

-D-

In the district court, respondent sought to justify its mandatory arrest policy because its officers do not carry ordinance citation forms. When asked by respondent's counsel to explain the reason for the municipal policy, Commander

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21. Under Nevada law, a misdemeanor is punishable by imprisonment of not more than six months, or a fine of not more than one thousand dollars. Nev.Rev.Stat. §193.150. The penalties for a "gross misdemeanor" are imprisonment of up to one year or a fine of not more than two thousand dollars. Nev.Rev.Stat. §193.140.

Fellmann answered as follows (App. 31):

> Q. With regard to the local ordinance violation policy of the Village of Arlington Heights with regard to a business that does not have a Village of Arlington Heights business license, can you state why those persons are arrested?
>
> A. For violation of that village ordinance.
>
> Q. Why aren't they just issued a ticket, do you know?
>
> A. We have no instrument designed for citing them in the field. I mean, the manner in which our department is structured is that the complaint is prepared on a document at our station and bond is required if this is a bondable offense.

It would not be difficult for respondent to create an ticket book to issue field citations. Such an innovation would be neither new nor novel.[22] Instead, a ticket book for violations of the business license ordinance could be the same ticket book used by respondent's police officers to issue

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22. For example, Calif. Penal Code §853.5 (1997) provides as follows

> In all cases . . . in which a person is arrested for an infraction, a peace officer shall only require the arrestee to present his driver's license or other satisfactory evidence of his identity for examination and to sign a written promise to appear. Only if the arrestee refuses to present such identification or refuses to sign such a written promise may the arrestee be taken into custody.

The Ninth Circuit relied on this "expression of disinterest in allowing warrantless arrests for mere infractions" to hold "that a custodial arrest for such an infraction is unreasonable, and thus unlawful, under the Fourth Amendment." *United States v. Mota,* 982 F.2d 1384, 1389 (9th Cir. 1993).

parking tickets.

Respondent's policy of requiring the warrantless arrest of persons suspected of operating a business without a license cannot be justified by any need for emergency action when, as here, the alleged offender operates his business from a fixed address and the officers knew for at least two days before making the arrest that petitioner had not been issued a license. (App. 49.)

Nor can respondent's policy be sustained because it is necessary "to prevent [petitioner] from committing a misdemeanor which would have been a breach of the peace had the attempt been translated into action." Stone, *Arrest Without Warrant,* 1939 Wis.L.Rev 385 (1939). There is no suggestion in the record that operating an otherwise lawful business threatened the public peace.

Finally, respondent's municipal policy cannot be defended as necessary to initiate the prosecution for an ordinance violation. Persons charged with the fine only ordinance are neither fingerprinted nor photographed. (App. 38.) The only paperwork required to initiate a prosecution for an ordinance violation is a complaint which need be no different than a parking ticket.

In addition to the administrative convenience rationale it advanced in the district court, respondent may seek to uphold its municipal policy on the ground articulated by the Seventh Circuit and argue that a custodial arrest is necessary "in order to ensure compliance with the ordinance." (Pet.App. 7.) This theory was embraced by the Ohio Supreme Court in *White v. Kent,* 11 Ohio St. 550 (Ohio 1860) when it upheld a local ordinance that prohibited auction sales on the public way:

> It is evident that many ordinances necessary for good order and general convenience, as well as for the preservation of morals and decency, would be almost nugatory, if offenders could only be arrested upon

warrant. Such is clearly not the policy of the statute. 11 Ohio St. at 553.

Other jurisdictions rejected this rationale long ago, because "it is to all intents and purposes a separate and independent punishment for the offenses specified," *Judson v. Reardon,* 16 Minn. 431, 434 (1871) and because vesting officers with such power is "liable to great abuses." *Pow v. Beckner,* 3 Ind. 474, 478 (1852). The record in this case leaves no doubt about the potential for abuse — Officer Lehnert revealed that the officers were enforcing the business license ordinance "based on numerous complaints that our department had received in conjunction with [petitioner's] business." (App. 55.) Although none of the complaints provided a lawful basis for interfering with petitioner's business, the officers were able to summarily punish petitioner by exploiting respondent's full custodial arrest policy.

The central purpose of the Fourth Amendment was to curb the discretion vested by "general warrants: that placed "the liberty of every man in the hands of every petty officer." *Boyd v. United States,* 116 U.S 616, 625 (1886), quoting the remarks of James Otis. This is precisely the result of the rule adopted by the Seventh Circuit in this case.

Requiring full custodial arrests to compel compliance with a fine only ordinance imposes significant costs on the person arrested. An arrest — even one "to ensure compliance" — "is abrupt, is effected with force or threat of it, and often in demeaning circumstances." *United States v. Dionisio,* 410 U.S. 1, 10 (1973). "An arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States v. Marion,* 404 U.S. 307, 320 (1971).

In this case, respondent exploited the trauma of arrest "to stop the telemarketing firm from causing the kind of complaints you had received about them." (App. 25.) The police adopted this goal because petitioner's firm "was negatively reflecting upon the image of the department." *Id.* These totalitarian tactics undercut the role of the Fourth Amendment of preserving "one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state where they are the law." *Johnson v. United States,* 333 U.S. 10, 17 (1948).

Respondent's use of its mandatory arrest policy because petitioner's firm "was negatively reflecting upon the image of the [police] department," (App. 25), exemplifies the "arbitrary and discriminatory enforcement" that underlies the decision of the Florida Supreme Court to prohibit full custodial arrests for violation of a municipal ordinance requiring that all bicycles be equipped with gongs. *Thomas v. State,* 614 So.2d 468, 470-71 (Fla. 1993).

The lack of any legitimate justification for respondent's mandatory arrest policy is made plain by a comparison with the efficient citation procedure employed in California. There, "[w]hen an adult is arrested for an infraction (with the exception of a few specified Veh.Code violations), the arresting officer requires that the person present a driver's license or other satisfactory evidence of identification and sign a promise to appear. Only if the person refuses to present identification or to sign the promise to appear can he or she be taken into custody." *In re Rottanak K.,* 37 Cal.App.4th 260, 276, 43 Cal.Rptr.2d 543, 552 (1995). "[W]hen an adult is arrested for a misdemeanor and does not demand to be taken before a magistrate, he or she must be released once the arresting officer has prepared a written notice to appear in court and the arrestee has given a written promise to appear as specified in the notice, unless the officer makes special findings." *Id.*

There is no legitimate basis to vest policy officers with the authority to make full custodial arrests "in order to ensure compliance with the ordinance." This unregulated power makes the arresting officer the prosecutor and judge in a summary prosecution for an alleged violation of a fine-only ordinance. As this Court observed in *Wong Sun v. United States*, 371 U.S. 471 (1963), "[t]he history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice,'" quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Those who framed the Fourth Amendment would be appalled that a federal court had endorsed warrantless seizures "to ensure compliance" with an ordinance punishable by fine only.

-III-

The appropriate translation of the common law limitations on warrantless arrests in non-felony cases to fine-only infractions is that a custodial arrest is constitutionally unreasonable unless there is an actual or threatened breach of the peace: the Fourth Amendment should not be warped to permit arrests "to ensure compliance" with a fine-only ordinance.

The Seventh Circuit expressed the view that petitioner had been lawfully arrested because "a neutral magistrate following Illinois law would surely have issued a warrant in the case." (Pet.App. 8 n.1.) This view greviously misconceives the warrant clause: "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity

and leave the people's homes secure only in the discretion of police officers."[23] *Johnson v. United States*, 333 U.S. 10, 14 (1947).

The framers "after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance." *United States v. DiRe*, 332 U.S. 581, 595 (1948). Respondent's mandatory arrest policy resurrects the roving commission of the general warrants that were vilified by the framers and cannot stand.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals should be reversed and the case remanded to the district court.

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23. Because respondent's policy did not include any involvement by a judicial officer, this case does not present any question about whether a judge, consistent with the Fourth Amendment, could issue an arrest warrant for violation of a fine-only ordinance. *Cf. Pulliam v. Allen*, 466 U.S. 522 (1984) (upholding fee award against local magistrate after injunction to end magistrate's practice of incarcerating persons unable to post bail on fine-only offenses).